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## Criminal Procedure—*Illinois v. Gates*: A New Test for Informers' Tips

In what circumstances will an informer's tip to police furnish probable cause for a search? In the 1960s, the United States Supreme Court, in *Aguilar v. Texas*<sup>1</sup> and *Spinelli v. United States*,<sup>2</sup> established a "two-pronged test"<sup>3</sup> for determining the presence of probable cause. In the recent case of *Illinois v. Gates*,<sup>4</sup> however, the Supreme Court abandoned the *Aguilar-Spinelli* test and adopted a "totality of the circumstances" standard, which the Court felt would "better achieve the accommodation of public and private interests that the Fourth Amendment requires."<sup>5</sup> The *Gates* decision has far-reaching implications for the future course of fourth amendment<sup>6</sup> jurisprudence, for it loosens the probable cause standard and thus decreases the likelihood that evidence seized pursuant to an informer's tip will be excluded from use at trial.

To understand *Illinois v. Gates*, it is necessary to understand the *Aguilar-Spinelli* test. The test traditionally is stated as having two prongs, a veracity prong and a basis of knowledge prong.<sup>7</sup> The veracity prong requires a showing that the informant should be believed—that he is a credible person or that his information is reliable.<sup>8</sup> The basis of knowledge prong requires that the tip

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1. 378 U.S. 108 (1964).

2. 393 U.S. 410 (1969).

3. *Id.* at 413.

4. 103 S. Ct. 2317 (1983).

5. *Id.* at 2332.

6. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, or the persons or things to be seized.

U.S. CONST. amend. IV.

7. In *Aguilar* the Supreme Court held insufficient an affidavit which stated that "[a]ffiants have received reliable information from a credible person and do believe that [narcotics and other drugs] are being kept at the above described premises." *Aguilar*, 378 U.S. at 109. Justice Goldberg, writing for the majority, stated that: "[t]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" *Id.* at 114 (emphasis added). These two separate requirements are generally referred to as the two-pronged test of *Aguilar*.

The two-pronged test has generated a vast amount of commentary. The most illuminating sources are LaFave, *Probable Cause from Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1, and Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974). Professor LaFave's article is substantially reproduced in W. LAFAVE, 1 SEARCH AND SEIZURE § 3.3 (1978). See also Livermore, *The Draper-Spinelli Problem*, 21 ARIZ. L. REV. 945 (1979); Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703 (1972); Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the Spinelli/Draper Dichotomy in Illinois v. Gates*, 20 AM. CRIM. L. REV. 99 (1982); Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958 (1969); Note, *Probable Cause and the First-Time Informer*, 43 U. COLO. L. REV. 357 (1972).

8. The veracity prong serves the same purpose as the oath required of an officer presenting first-hand facts as the basis for a warrant. Moylan, *supra* note 7, at 751. Because the officer gives his information under oath, no independent inquiry into his credibility is needed. When the officer reports an informant's tip in an affidavit, however, the informant's information is hearsay.

reveal some of the underlying circumstances from which the informer has concluded that evidence of illegal activity is where he says it is.<sup>9</sup> A tip insufficient on its face to support a finding of probable cause may be buttressed by police corroboration, but the partially corroborated tip must be "as reliable as one which passes *Aguilar's* requirements when standing alone."<sup>10</sup>

The veracity prong most often was satisfied by a statement that the informant had provided accurate information in the past,<sup>11</sup> but could also be satisfied by police corroboration of details of the tip,<sup>12</sup> or by the inherent reliability of the source.<sup>13</sup> The basis of knowledge prong was satisfied most easily by statements of first-hand experience (as when the informer states that he has seen drugs at a certain location),<sup>14</sup> but could also be satisfied by an abundance of detail in the tip, from which the magistrate could infer that the informer must have acquired his information in a reliable way.<sup>15</sup>

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Because it is not given under oath, the veracity of the hearsay must be established before it may form the basis of a finding of probable cause.

The veracity prong is sometimes characterized as having two "spurs"—a credibility spur and a reliability spur. See Moylan, *supra* note 7, at 757-65. This distinction refers to the two ways in which an informer's veracity may be established—either by demonstrating his credibility in prior cases or his reliability in the present case.

9. The basis of knowledge prong is merely an extension of the general principle that, whenever possible, the probable cause determination should be made by a neutral arbiter, and that an officer's conclusory statements are insufficient to support a warrant. See *Johnson v. United States*, 333 U.S. 10 (1948), holding that inferences from evidence should be "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 13-14. The officer must set out the facts from which he has drawn his conclusions, so that the magistrate can judge the validity of those conclusions. See *Giordenello v. United States*, 357 U.S. 480 (1958); see also *Whiteley v. Warden*, 401 U.S. 560 (1971). If an officer's conclusory statement is forbidden, it follows that an informer's bare conclusion should also be rejected. See Moylan, *supra* note 7, at 751. The informer's tip must provide sufficient information about his basis of knowledge to allow the magistrate properly to exercise his constitutional function.

10. *Spinelli*, 393 U.S. at 416. In *Spinelli* the police received a tip from a "confidential reliable informant" that defendant was conducting an illegal bookmaking operation. The tip failed to satisfy either prong of the *Aguilar* test, as it revealed nothing about the informant's basis of knowledge and contained no information about the conclusory statement that he was reliable. The tip and results of an independent police investigation were presented together to a magistrate, who then issued a search warrant. The Supreme Court ruled that the tip should be evaluated in light of such additional information. *Id.* at 416. Even when considered in light of the additional evidence, however, the Court found that *Aguilar's* requirements had not been satisfied. *Id.* at 417-18.

11. See, e.g., *McCray v. Illinois*, 386 U.S. 300 (1967); see generally LaFave, *supra* note 7, at 10.

12. See *Spinelli*, 393 U.S. at 427 (White, J., concurring) ("[B]ecause an informant is right about some things, he is more probably right about other facts.").

13. See Moylan, *supra* note 7, at 765 (discussion of the "citizen-informer"). The ordinary citizen is presumed more reliable than the regular police informer, who usually is a criminal himself or is from the criminal milieu. *United States v. Harris*, 403 U.S. 573, 599 (1971) (Harlan, J., dissenting). The *Harris* case also established that the veracity prong may be satisfied by an admission which is against the penal interest of the informant, *id.* at 583, though this aspect of the holding has been sharply criticized. See Note, *Probable Cause and the First-Time Informer*, *supra* note 7, at 366.

14. *Aguilar* cited with approval the affidavit in *Jones v. United States*, 362 U.S. 257 (1960). The informer in *Jones*, who had previously furnished reliable information to the police, stated that he had recently purchased narcotics at the home in question. *Id.* at 267 n.2. Ideally, the tip should present the informer's first-hand observations, from which the magistrate can evaluate the validity of his conclusions. Moylan, *supra* note 7, at 773.

15. *Spinelli*, 393 U.S. at 417. This is often referred to as the "self-verifying detail," and is an alternative means of satisfying the basis of knowledge prong when the tip fails to set out the

The Illinois Supreme Court applied the *Aguilar-Spinelli* test in *People v. Gates*.<sup>16</sup> On May 3, 1978, the police department of Bloomingdale, Illinois, received an anonymous letter which alleged that two of the town's residents, Lance and Susan Gates, were drug dealers, and described their alleged *modus operandi* for smuggling drugs from Florida.<sup>17</sup> Based on the letter's prediction that the couple would soon be making a trip to Florida, the police checked airline records and discovered that Lance Gates had booked a flight to West Palm Beach, Florida, departing May 5.<sup>18</sup> Drug Enforcement Administration agents followed Gates upon his arrival in Florida, and reported that he had gone to a motel room registered to a Susan Gates. The next morning, the agents observed the couple enter a car bearing a license plate registered to Lance Gates,<sup>19</sup> and saw them drive northbound on "an interstate frequently used by travelers to the Chicago area."<sup>20</sup>

The police presented the anonymous letter and the results of their independent investigation<sup>21</sup> in an affidavit to a local judge, who issued a search warrant for the car and the Gateses' residence. Twenty-two hours after their departure from Florida, the Gateses returned to Bloomingdale. Officers

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informer's first-hand observations. See Moylan, *supra* note 7, at 775. This point is a good illustration of the independent nature of the *Aguilar-Spinelli* prongs. A detailed tip, though uncorroborated, provides a sufficient showing of the basis of knowledge, but the veracity of the source also must be established. Otherwise, a liar could provide probable cause by fabricating a detailed story. See Stanley v. State, 19 Md. App. 508, 313 A.2d 847 (1974).

16. 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd*, 103 S. Ct. 2317 (1983).

17. The anonymous letter provided:

This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies [*sic*] down and drives it back. Sue flies [*sic*] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over \$100,000.00 in drugs. Presently they have over \$100,000.00 worth of drugs in their basement.

They brag about the fact they never have to work, and make their entire living on pushers.

I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.

Lance & Susan Gates  
Greenway  
in Condominiums

*Gates*, 103 S. Ct. at 2325.

18. Apparently, no information was obtained about the travel plans of Susan Gates, probably because the police received the letter on the same day she was alleged to be driving to Florida.

19. The license plate was not registered to the car the Gateses were driving. *Gates*, 103 S. Ct. at 2326. The significance of this fact is unclear. While arguably engendering suspicion, it seems unlikely that a criminal in taking the trouble to tamper with a license plate would drive a car bearing a plate registered to him.

20. *Id.* at 2326. Justice Stevens pointed out the absurdity of this statement in his dissent. *Id.* at 2360 n.3 (Stevens, J., dissenting). The interstate highway is I-95, and it is frequently used by any northbound traveler leaving Florida's east coast.

21. The early investigation revealed that Lance Gates was indeed a resident of Bloomingdale, Illinois, and the police obtained an address from a confidential informant that was more recent than the one on Gates' driver's license. *Id.* at 2325. This informant did not figure into the probable cause determination. See Comment, *supra* note 7, at 118 n.179.

awaiting their arrival searched the car and home, and discovered approximately 350 pounds of marijuana and other contraband.<sup>22</sup>

Defendants moved to suppress the seized evidence on the grounds that the affidavit was insufficient to support a finding of probable cause under the *Aguilar-Spinelli* test. The state circuit court upheld the challenge, and the Illinois Supreme Court affirmed.<sup>23</sup> The court held that neither prong of *Aguilar* had been satisfied.<sup>24</sup>

The United States Supreme Court reversed.<sup>25</sup> In a majority opinion written by Justice Rehnquist,<sup>26</sup> the Court did not consider whether the lower court had properly applied the *Aguilar-Spinelli* test, but instead adopted and applied a new, less rigorous standard:

We agree with the Illinois Supreme Court that an informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case . . . . Rather, . . . they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.<sup>27</sup>

The Court expressly abandoned the two-pronged test established in *Aguilar*

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22. *Gates*, 103 S. Ct. at 2326.

23. *People v. Gates*, 85 Ill.2d 376, 423 N.E.2d 887 (1981).

24. *Id.* at 390, 423 N.E.2d at 893.

25. Many expected the Supreme Court to use the *Gates* case to modify the exclusionary rule, which requires suppression of any evidence illegally seized. After hearing oral argument on the case, the Court requested the parties to brief and argue the additional question of whether the exclusionary rule should be modified to allow admission of evidence seized in a reasonable belief that a search was constitutional. *See Illinois v. Gates*, 103 S. Ct. 436 (1982). In the final decision, however, the Court, "with apologies to all," decided not to reach this question. *Gates*, 103 S. Ct. at 2321. The rationale for this decision was that the issue had not been passed upon by the lower court, and thus was outside the Court's jurisdiction. *Id.* at 2322. A more practical consideration that may have influenced the Court's decision was that it did not want to be open to criticism for having reached out to modify such an important rule.

Justice White reaffirmed his previously-expressed opinion, *see Stone v. Powell*, 428 U.S. 465, 537 (1976) (White, J., dissenting), that the exclusionary rule should be modified to allow admission of evidence seized pursuant to good faith mistakes. He also contended that the issue was appropriate for decision in *Gates*. *Gates*, 103 S. Ct. at 2336 (White, J., concurring).

The Court has recently granted certiorari to three cases that may provide appropriate vehicles for a modification of the rule. *See United States v. Leon*, 701 F.2d 187 (9th Cir.) (unpublished opinion), *cert. granted*, 103 S. Ct. 3535 (1983); *Colorado v. Quintero*, — Colo. —, 657 P.2d 948, *cert. granted*, 103 S. Ct. 3535 (1983); *Massachusetts v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983); *see also* 51 U.S.L.W. 3913, 3914 (U.S. June 28, 1983) (summarizing issues raised by certiorari petitions in the foregoing cases).

The merit of the exclusionary rule is the most debated issue in criminal procedure today. The question whether it should be modified, however, is outside the scope of this note.

26. Justice White concurred in the judgment, but wrote a separate opinion. *Gates*, 103 S. Ct. at 2336 (White, J., concurring). Justice Brennan dissented, joined by Justice Marshall. *Id.* at 2351 (Brennan, J., dissenting). Justice Stevens filed his own dissent, in which Justice Brennan also joined. *Id.* at 2360 (Stevens, J., dissenting).

27. *Id.* at 2327-28.

and *Spinelli* in favor of this "totality of the circumstances" approach.<sup>28</sup> The new test requires the magistrate "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."<sup>29</sup>

The Court offered a number of reasons for abandoning the *Aguilar-Spinelli* test. First, the Court noted that the totality of the circumstances approach was more consistent with the traditional concept of probable cause,<sup>30</sup> citing from prior decisions language that probable cause is a "practical, non-technical concept,"<sup>31</sup> and that "technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area."<sup>32</sup> Because the *Aguilar-Spinelli* analysis required that two independent tests be satisfied before probable cause could be found, the Court felt that it was incompatible with the traditional interpretation of the fourth amendment's requirements.<sup>33</sup> While preserving the informant's veracity and basis of knowledge as relevant considerations,<sup>34</sup> the Court stated that independent satisfaction of both prongs was unnecessary; "a deficiency in one may be compensated for . . . by a strong showing as to the other."<sup>35</sup>

As further support for the totality of the circumstances approach, the Court noted that affidavits in support of warrants normally are drafted by laymen, and that search warrants often are issued by persons with no formal legal training.<sup>36</sup> The Court concluded that the "rigorous inquiry" required by the *Aguilar-Spinelli* test was incompatible with the significant role of laymen in probable cause determinations.<sup>37</sup> The Court also feared that overly-rigid scrutiny of police affidavits might encourage warrantless searches.<sup>38</sup> Finally, the Court reasoned that *Aguilar-Spinelli* should be abandoned because the "strictures" of the two-pronged test were unduly impeding the task of law enforcement officers.<sup>39</sup>

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28. *Id.* at 2332. Such an approach had been expressly disapproved in *Spinelli*, 393 U.S. at 415.

29. *Gates*, 103 S. Ct. at 2332.

30. *Id.* at 2328.

31. *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

32. *Id.* at 2330 (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)).

33. *Id.* at 2329.

34. *Id.*

35. *Id.*

36. *Id.* at 2330. The Court stated that these laymen "certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.'" This assertion is a bit troubling, given the importance of the magistrate in the search and seizure process. See *supra* note 9. While the magistrate's status as a laymen certainly mitigates in favor of a probable cause test that is easy to apply, requiring him to stay informed about the current state of the law he is sworn to uphold would seem to be a reasonable condition of employment.

37. *Gates*, 103 S. Ct. at 2330-31.

38. *Id.* at 2331. Justice Brennan disputed this contention, emphasizing the principle that warrantless searches are, as a general rule, unreasonable, subject to a few "jealously and carefully drawn" exceptions. *Id.* at 2358 n.9 (Brennan, J., dissenting).

39. *Id.* at 2331-32. The Court based this conclusion on a belief that anonymous tips could seldom pass the two-pronged test. *Id.* This assertion is somewhat misleading. See *id.* at 2356

Justice Brennan, in dissent, severely criticized the Court's decision to abandon the *Aguilar-Spinelli* rules. Justice Brennan disagreed with the majority's assertion that the test was inconsistent with the Court's prior treatment of probable cause.<sup>40</sup> He characterized the test as a necessary instrument "to insure that findings of probable cause, and attendant intrusions, are based on information provided by an honest or credible person who has acquired [his] information in a reliable way."<sup>41</sup> Justice Brennan went on to argue:

The Court's complete failure to provide any persuasive reason for rejecting *Aguilar* and *Spinelli* doubtlessly reflects impatience with what it perceives to be "overly technical" rules governing searches and seizures under the Fourth Amendment. Words such as "practical," "non-technical," and "commonsense," as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment.<sup>42</sup>

Justice White, concurring, took a middle position. While agreeing with the majority that the lower court's holding should be reversed, Justice White based his conclusion on a belief that the *Aguilar-Spinelli* requirements had been satisfied.<sup>43</sup> Police corroboration of the tip, according to Justice White, was sufficient to enable the magistrate to conclude both that the anonymous informant was credible and that he had obtained his information in a reliable way.<sup>44</sup> His ability to predict in advance the "unusual"<sup>45</sup> travel plans of the

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(Brennan, J., dissenting). Although, as the Court observed, the veracity of anonymous informers is "largely unknown, and unknowable," veracity may be established by independent corroboration of details in the tip. See *supra* note 12. Basis of knowledge may be established by sufficient details in the tip, see *supra* note 15, or by corroborating enough details to allow the magistrate to conclude that the informer had an adequate basis for his knowledge. See *supra* note 12. Finally, the tip, insufficient on its face, may lead the police to facts that provide probable cause standing alone, thus avoiding the need to apply *Aguilar-Spinelli*.

The Court's statement that the *Aguilar-Spinelli* standard leaves no room for "anonymous citizen informants" is also misleading. *Gates*, 103 S. Ct. at 2332. By definition, there is no way of knowing whether an anonymous tip that fails *Aguilar's* test came from an honest citizen or a person bent on harassment. See Comment, *supra* note 7, at 107 (arguing that tips from anonymous informants are presumptively unreliable).

40. *Gates*, 103 S. Ct. at 2357 (Brennan, J., dissenting).

41. *Id.* at 2356 (Brennan, J., dissenting).

42. *Id.* at 2359 (Brennan, J., dissenting).

43. *Id.* at 2347 (White, J., concurring).

44. *Id.* at 2349 (White, J., concurring).

45. *Id.* While the peregrinations of the Gateses were certainly unusual, the details known to the police at the time they applied for the warrant could hardly be characterized as such. At the time the warrant issued, the police knew that: (1) a man had flown to Florida; (2) had spent the night in a motel room registered in his wife's name; and (3) had driven northbound the next morning. If they had also known that Sue Gates had driven 22 hours to Florida two days before her husband's arrival, and that the northbound morning drive would end 22 hours later in Bloomington, suspicion would have been justified.

This factual shortcoming formed the basis of Justice Stevens' dissent. Noting that "subsequent events may not be considered in evaluating [a] warrant," *id.* at 2361 (Stevens, J., dissenting), and that the tip had been mistaken in part (the tip had predicted that Sue Gates would return to Illinois before her husband flew to Florida, raising the inference that the Gateses did not want to leave their home unguarded), Justice Stevens argued that the search of the house was not supported by probable cause. He urged a remand to consider whether the search of the car could be justified as a valid warrantless search.

Gates suggested that the informant had a reliable basis for his knowledge.<sup>46</sup> Because he believed that *Aguilar-Spinelli* had been satisfied, Justice White concurred in the Court's result.<sup>47</sup>

Justice White did not, however, join the majority in overruling *Aguilar* and *Spinelli* because he feared that "the Court's holding may foretell an evisceration of the probable cause standard."<sup>48</sup> He stated that the *Aguilar-Spinelli* analysis plays a proper role in probable cause determinations, and that any probable cause test should expressly require a satisfactory showing on each independent prong.<sup>49</sup> Justice White admitted that many lower courts had been applying *Aguilar* and *Spinelli* in an overly technical manner, but urged that a clarification of the cases, not a new standard, was the proper remedy for this problem.<sup>50</sup> He contended that the Court should give more guidance to an issuing magistrate than simply an instruction to use his common sense, and thus concluded that the majority's totality of the circumstances test was an ill-advised abdication of the Court's responsibility in the probable cause area.<sup>51</sup>

The distinctions between the probable cause inquiry required by *Gates* and that previously mandated by *Aguilar-Spinelli* are subtle. While *Aguilar-Spinelli* required that an informant's veracity and his basis of knowledge be established before probable cause could be found, *Gates* instructs the magistrate to consider the totality of the circumstances presented to him in deciding whether a warrant should issue.<sup>52</sup> *Gates*, however, reaffirms that the informant's veracity, reliability, and basis of knowledge are all "highly relevant" in weighing the value of his report.<sup>53</sup> The important difference between *Aguilar-Spinelli* and *Gates* is that *Gates* does not require separate, independent showings on each prong before probable cause may be found.<sup>54</sup> Under *Gates*, a

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46. Ironically, Justice White's concurrence clarified what had been a very uncertain issue under *Aguilar-Spinelli*—the effect of police corroboration. Some commentators had read *Spinelli* to mean that corroboration of facts in a deficient tip may establish the veracity of the informant, but never his basis of knowledge. See Comment, *supra* note 7, at 105; see also *Gates*, 103 S. Ct. at 2355 (Brennan, J., dissenting). Others had argued that only corroboration of incriminating, rather than innocent, details should be relevant. See Rebell, *supra* note 7, at 716-17; Note, *The Informer's Tip as Probable Cause for Search or Arrest*, *supra* note 7, at 967. Justice White pointed out that while corroboration will generally only go to the reliability of the informer, see *supra* note 12, it sometimes will give rise to the inference that the informer had an adequate basis for his information. In *Draper v. United States*, 358 U.S. 307 (1959), for instance, an informer was able to provide a detailed description of a suspect and the clothes he would be wearing two days before that person's arrival in Denver by train. In that case the Court concluded that the informant had an adequate basis for his assertion that the suspect would be carrying heroin. Detailed information of the type provided by the informant in the *Draper* case is not ordinarily a matter of common knowledge, but must have come from reliable inside knowledge. *Gates*, 103 S. Ct. at 2348-49 (White, J., concurring). Rather than focusing on whether corroborated facts are "innocent" or "incriminating," it is more useful to ask whether the facts are of a type not easily ascertained, thus suggesting an adequate basis of knowledge. See *United States v. Montgomery*, 554 F.2d 754 (5th Cir. 1977) (crucial facts are those that reveal "personal pipeline" to the criminal scheme).

47. *Gates*, 103 S. Ct. at 2349-50 (White, J., concurring).

48. *Id.* at 2350 (White, J., concurring).

49. *Id.* (White, J., concurring).

50. *Id.* at 2350-51 (White, J., concurring).

51. *Id.* at 2351 (White, J., concurring).

52. *Id.* at 2332.

53. *Id.* at 2327.

54. *Id.* at 2327-28.



deficient showing on one prong now may be remedied by an unusually strong showing on the other, as part of the totality of the circumstances analysis.<sup>55</sup> This modification, though slight, has potentially undesirable consequences.

The Supreme Court adopted the *Aguilar* test to deal with a specific problem—the proper role of hearsay in probable cause determinations.<sup>56</sup> The test was formulated to allow trustworthy hearsay to be considered. The veracity and basis of knowledge requirements were devised to ensure that only hearsay which rose to a certain minimum level of trustworthiness would provide the basis for a search warrant.<sup>57</sup> Only if kept analytically distinct do the two prongs perform their intended function.<sup>58</sup>

The abandonment of the requirement that both of *Aguilar*'s prongs be satisfied, though a subtle modification, increases the probability that untrustworthy hearsay will provide the basis for a search. The Court stated that an explicit and detailed tip accompanied by a statement that criminal activity was observed in person is entitled to greater weight, regardless of any showing of the informant's veracity.<sup>59</sup> But such a detailed statement, which represents a more than adequate showing of the informer's basis of knowledge, does not make it any more probable that the person is telling the truth.<sup>60</sup> A liar may concoct a story alleging first-hand observation as easily as he may concoct bald accusations.<sup>61</sup> The increased detail does not reduce the possibility that the informer may be lying, yet under *Gates*, it may well be held sufficient for a warrant to issue.

Likewise, the *Gates* majority exhibited flawed reasoning when it sug-

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55. *Id.* at 2329. This change is the essence of the totality of the circumstances approach. Deficiencies may also be compensated for by the "other indicia of reliability." *Id.*

56. The Supreme Court first formally considered the question of hearsay as the basis for a warrant only four years prior to *Aguilar*, in *Jones v. United States*, 362 U.S. 257 (1960). In *Jones* the Court held that hearsay could be the basis for a warrant as long as the magistrate had a "substantial basis" for crediting the hearsay. *Id.* at 269. Some have viewed *Jones* as conflicting with *Aguilar*, and have read the "substantial basis for crediting" language as a less restrictive alternative to *Aguilar*'s two-pronged test. See Moylan, *supra* note 7, at 781. The better view is that the *Aguilar* test defines what constitutes a "substantial basis." Since *Aguilar* cited *Jones* with approval, see *supra* note 14, it is more logical to read *Aguilar* as an extension of *Jones*, rather than as a rejection of it. Moylan, *supra* note 7, at 781.

57. See *supra* notes 8-9 for the historical origins of the two prongs.

58. For an excellent discussion of the distinct functions of the two *Aguilar-Spinelli* prongs, see Moylan, *supra* note 7, at 750-52.

59. *Gates*, 103 S. Ct. at 2329-30. This "greater weight" might be enough to justify a probable cause finding under the new totality of the circumstances test, notwithstanding the remaining doubts about the informant's veracity.

60. If the person were known to the police, and presented a detailed statement of criminal activity, then it could be argued that he probably would not be fabricating such a story. The Court has recognized that a statement given under circumstances that would subject the source to criminal liability if false is presumed to be reliable. See *Adams v. Williams*, 407 U.S. 143 (1972). Typically, however, an informer of unknown veracity is *not* known to the police; otherwise, his veracity would have been established by his prior track record or by the citizen-informer exception, see *supra* notes 11, 13 and accompanying text. Because such an anonymous source could be fabricating a detailed story for a variety of reasons, some showing of credibility or reliability should be required. Under *Aguilar-Spinelli* his reliability could be established by corroboration of details of the tip.

61. See Moylan, *supra* note 7, at 781; see also, Note, *Probable Cause and the First-Time Informer*, *supra* note 7.

gested that, if an informer is known for his unusual reliability, his tip is entitled to more weight, and deficiencies in his basis of knowledge may be overlooked.<sup>62</sup> The Court's statement has some logical appeal, for if a person is reputable and credible, it is more likely that he has a reliable basis for his accusations. But Justices White and Brennan both identified the flaw in this reasoning: the Court has consistently held that a police officer, known to be credible and honest, must still present to the magistrate the basis of his knowledge.<sup>63</sup> This requirement is essential to the magistrate's role as a neutral arbiter in the warrant process. In the words of Justice White, "it would be 'quixotic' if a . . . statement from an honest informant, but not one from an honest officer, could furnish probable cause."<sup>64</sup> This result is possible, however, under the test announced in *Gates*.

The Court justified abandoning the *Aguilar-Spinelli* test by emphasizing the need for flexibility and practicality in probable cause determinations.<sup>65</sup> The Court argued that the two-pronged test was rigid and technical, that any such test was incompatible with traditional notions of probable cause, and that therefore the test should be abandoned.<sup>66</sup> This emphasis on traditional notions of probable cause is misleading. *Aguilar* and *Spinelli* address a special probable cause problem—probable cause based on hearsay information.<sup>67</sup> Because informers' tips are inherently more uncertain than information from an officer, a somewhat more rigorous test is needed to ensure that untrustworthy information does not provide the basis for a search warrant. For this rea-

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62. *Gates*, 103 S. Ct. at 2329. As in the case of the detailed tip of questionable veracity, this added weight may justify a probable cause finding under the new test, despite the incomplete showing of the informer's basis of knowledge.

63. *Id.* at 2350 (White, J., concurring); *id.* at 2356 (Brennan, J., dissenting). The basis of knowledge requirement is thus a procedural safeguard; it does not relate to the truthfulness of the source. No matter how credible the informer, the raw data on which he has based his conclusions must be presented, so that the neutral magistrate may evaluate the validity of those conclusions. See *supra* note 9.

64. *Gates*, 103 S. Ct. at 2350 (White, J., concurring). As Justice White observed, it is doubtful that the Court intended this illogical result. *Id.* The majority opinion expressly reaffirmed the holdings of *Aguilar* and *Nathanson v. United States*, 290 U.S. 41 (1933), that a wholly conclusory statement cannot be the basis for a probable cause finding. *Gates*, 103 S. Ct. at 2332. Justice White noted that the majority limited these decisions to affidavits involving "bare conclusions," and expressed concern that if an affidavit contained anything more, it would be left only to the magistrate's common sense to determine whether a warrant should issue. *Id.* at 2350 (White, J., concurring).

Another potential problem is the misreading of *Gates* by lower courts. If the general language allowing compensation for deficiencies by a strong showing on one prong is not read in conjunction with the interdiction of conclusory statements, it is possible that an affidavit containing no information about the basis of the informer's knowledge could be held sufficient. See, e.g., *United States v. Kolodziej*, 712 F.2d 975, 977 (5th Cir. 1983) ("Absent some of the underlying facts from which the informant concluded that criminal activity had taken place, a finding of probable cause is nonetheless warranted under *Gates* if a strong showing regarding the informant's reliability is made."). A literal application of this statement as 'the rule of *Gates*' would lead to the quixotic result feared by Justice White.

65. *Gates*, 103 S. Ct. at 2328.

66. See *supra* notes 31-39 and accompanying text.

67. It is important to keep in mind that the Court, in formulating the test in *Aguilar*, drew heavily upon "traditional" principles in the probable cause field. See *supra* notes 8-9.

son, the probable cause inquiry required when information from an informer is presented differs from that required in a more traditional context.

Justice Brennan argued in dissent that *Aguilar* and *Spinelli* are consistent with the principle that probable cause is a "practical, nontechnical" concept.<sup>68</sup> This point is valid, but is often lost in discussions of "spurs" or "self-verifying details."<sup>69</sup> The technical vocabulary used in connection with the *Aguilar-Spinelli* prongs belies the underlying simplicity of the test. The magistrate is required to ask two simple questions. First, he must ask, "Why should information from this informant be believed?"—the veracity prong.<sup>70</sup> Second, he must ask, "Has the informant obtained his information in a reliable way?"—the basis of knowledge prong.<sup>71</sup> The second test should be especially easy for the magistrate to apply because it is the same test that is applied to an affidavit that does not contain hearsay.<sup>72</sup> The first prong should also be easily applied by the magistrate, for most often the informer's credibility will have been established by his prior experiences with the police or by independent police investigation.<sup>73</sup> The more difficult cases are those similar to *Spinelli*, in which a tip that alone would be insufficient is presented to the magistrate along with some police corroboration. The different ways in which each prong can be satisfied have been well established, however, and the magistrate need only examine the affidavit to determine whether the given case satisfies any of these alternative tests.<sup>74</sup> With proper guidelines the magistrate should be fully able to apply the *Aguilar-Spinelli* test in an efficient manner.<sup>75</sup>

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68. *Gates*, 103 S. Ct. at 2357-58 (Brennan, J., dissenting). Justice Brennan argued that under *Aguilar* and *Spinelli* magistrates were free to apply a practical, commonsense conception of probable cause if they had first determined that the information before them had been obtained in a reliable way by a credible person. *Id.*

69. See *supra* note 8 for discussion of "spurs" and *supra* note 15 for discussion of the "self-verifying detail." The Court referred to the *Aguilar-Spinelli* rules as a "labyrinthine body of judicial refinement," *Id.* at 2333, and some of the majority's discussions of these rules border on the sarcastic, see, e.g., *id.* at 2327 n.4. While a good deal of technical-sounding language has developed in connection with the test, see, e.g., *Stanley v. State*, 19 Md. App. 507, 313 A.2d 847, cert. denied, 271 Md. 745 (1974), most of the concepts involved are not as intimidating as the terms that describe them. For instance, the reliability and credibility spurs of the veracity prong stand for the proposition that an informer's veracity may be established either by his prior record (credibility) or by evidence that tends to show that the tip involved a particular case should be believed (reliability). See Moylan, *supra* note 7, at 754.

70. See Note, *The Informer's Tip as Probable Cause for Search or Arrest*, *supra* note 7, at 960.

71. *Id.*

72. See *supra* note 9. This test is better understood as a general requirement, applicable to all warrants, that the information on which conclusions are based must be presented to the magistrate. See *Gates*, 103 S. Ct. at 2356 n.6 (Brennan, J., dissenting). The magistrate is required to examine the officer's affidavit to determine whether the officer's information supports his conclusions.

73. See *supra* notes 11-13 and accompanying text.

74. See *supra* notes 11-15 and accompanying text. The magistrate could easily use a checklist-type analysis in applying the *Aguilar-Spinelli* test. For instance, he could ask:

(1) Does the tip clearly reveal the basis of the informer's conclusion (e.g., a statement alleging first-hand observation of criminal activity)?

(2) If not, does the tip contain detail sufficient to permit the inference that the informer must have a reliable basis for his conclusions?

(3) If not, do the corroborated details of the tip permit such an inference?

75. Justices Rehnquist and Brennan expressed strongly differing views regarding formal, judicial guidelines such as the *Aguilar-Spinelli* test. Justice Rehnquist believed that a mandatory test

The Court's argument that the *Aguilar-Spinelli* test unduly impedes the task of law enforcement officers<sup>76</sup> is also questionable. The information required by *Aguilar-Spinelli* is information that should be the subject of police inquiry even if there were no test.<sup>77</sup> The two prongs are not technicalities that have no connection to routine investigatory work. The veracity prong merely requires the officer to set forth the answer to a question that he should have asked of himself upon receiving a tip: Why should this person be believed? If the question cannot be answered satisfactorily, the officer should not be presenting the tip as grounds for a warrant. With respect to the basis of knowledge prong, the officer presumably knows that his own conclusory allegations will be insufficient to support a warrant.<sup>78</sup> It should not be overly burdensome, therefore, to require him to inquire into the informer's basis of knowledge. The Court argued that most informers "generally do not provide extensive recitations of the basis of their everyday observations."<sup>79</sup> This argument is not compelling, however, for as Justice Brennan observed, it ignores the possibility that the officer, cognizant of the importance of basis of knowledge to the constitutional role of the magistrate, can elicit this information from the informant, with whom he usually will be in verbal contact.<sup>80</sup> For instance, if officer *A* receives a tip from *B*, a regular police informer, that *X* has cocaine in his house, he need only ask *B*, "How do you know this?" Most often, this simple question will result in a statement that *B* has witnessed a sale at the residence, or that he has personally purchased drugs from *X*. Requiring the officer to make this inquiry is not a useless technicality, for the question eliminates the possibility that *B* has based his conclusion on a "casual rumor circulating in the underworld."<sup>81</sup>

When an anonymous tip is involved, the basis of knowledge requirement is more difficult to satisfy because the officer usually does not have the opportunity to question further the person supplying information.<sup>82</sup> The majority focused on this instance in illustrating how the *Aguilar-Spinelli* requirements

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restricted the magistrate in the exercise of his constitutional function, and that a formal test was inappropriate for laymen to apply. *Gates*, 103 S. Ct. at 2330, 2333. Justice Brennan took the opposing view that a formal test helps the layman by structuring the probable cause inquiry, and reinforces the constitutional role of the magistrate by requiring certain information to be presented to him. *Id.* at 2355, 2358 (Brennan, J., dissenting).

76. See *id.* at 2331; see also *supra* note 39 and accompanying text.

77. The court's comments in *Gonzales v. Beto*, 425 F.2d 963 (5th Cir. 1970), are instructive:

It is not the intent of the *Aguilar* and *Spinelli* decisions to make it difficult for a policeman to get a warrant if in fact he has probable cause. On the contrary, the cases contemplate that an affiant with some basic understanding of the law can get a warrant if he has probable cause and simply sits down and explains why.

*Id.* at 970.

78. See Moylan, *supra* note 7, at 751.

79. *Gates*, 103 S. Ct. at 2331.

80. *Id.* at 2356 n.6 (Brennan, J., dissenting).

81. *Spinelli*, 393 U.S. at 416.

82. While this is usually the case, sometimes the police will have the opportunity to elicit additional information from an informer despite his anonymity. See *United States v. Bush*, 647 F.2d 357, 359-60 (3d Cir. 1981) (anonymous tip provided by series of phone calls to DEA agents).

unduly impeded police officers.<sup>83</sup> If an anonymous letter contains only sketchy details supporting the informer's assertion that criminal evidence exists in a certain location, however, a strong argument may be made that, given the uncertainty of the source, the law enforcement process should be impeded at this point.<sup>84</sup> The tip will still be of use to the police, for even if it cannot satisfy *Aguilar-Spinelli* and provide probable cause by itself, it may trigger a police investigation that will uncover evidence sufficient to constitute probable cause.<sup>85</sup> With the alternative of further investigation, subjecting anonymous tips to the *Aguilar-Spinelli* test imposes only a minimal burden on the law enforcement process, and also protects citizens from intrusions based on less-than-reliable information.

Justice White, in his concurring opinion, correctly observed that even if some courts were applying the *Aguilar-Spinelli* test in an overly technical manner, it was not necessary to abandon the test to correct such undesirable results.<sup>86</sup> *People v. Palanza*,<sup>87</sup> cited by the majority as an example of the excessive technicality of *Aguilar-Spinelli*, illustrates Justice White's point. In *Palanza* the affidavit in question contained a statement by an informer of proven reliability that he had observed a white crystalline substance, which appeared to him to be cocaine, inside the defendant's residence.<sup>88</sup> The court held that the basis of knowledge prong had not been satisfied, and thus held the search unconstitutional under *Aguilar-Spinelli*. While the result in *Palanza* is undesirable, the case provides no basis for criticizing the *Aguilar-Spinelli* test, because the *Palanza* court applied the test incorrectly.<sup>89</sup> The allegation of first-hand observation is the best way to satisfy the basis of knowledge prong, and the informer's statement clearly was sufficient.<sup>90</sup> The lesson to be drawn from *Palanza* and other similar cases is that the *Aguilar-Spinelli* test should not

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83. *Gates*, 103 S. Ct. at 2331-32.

84. Justice Brennan noted that when a warrant is sought solely on the basis of an anonymous tip, the police have satisfied the procedural function of *Aguilar-Spinelli*, as they have presented to the magistrate all the information on which they are acting. Brennan felt, however, that the test served the additional function of guarding against probable cause findings based on untrustworthy information. *Id.* at 2356 n.6. His argument is even stronger if one accepts the premise that anonymous tips are presumptively unreliable. See Comment, *supra* note 7, at 107.

85. The facts of *Gates* best illustrate this point. Even if the request for a warrant based on the tip had been denied, the police would have been alerted to the Gateses as drug suspects. According to the anonymous source, the Gateses were conducting a substantial narcotics business using their house as a base. Surely police surveillance would have uncovered evidence suspicious enough to warrant a probable cause finding without reference to the initial tip. Delaying the search in cases like *Gates*, in which ongoing criminal conduct is alleged, until independent investigation has been made, would impose a small burden on the law enforcement process, yet greatly reduce the chances of an unconstitutional violation of a citizen's fourth amendment rights.

86. *Gates*, 103 S. Ct. at 2350-51 (White, J., concurring). As evidence of the test's shortcomings, the majority cited three state court opinions in which affidavits were found defective under *Aguilar-Spinelli*. *Id.* at 2330 n.9.

87. 55 Ill. App. 3d 1028, 371 N.E.2d 687 (1978).

88. *Id.* at 1029, 371 N.E.2d at 688.

89. The other two cases cited by the Court, *Bridger v. State*, 503 S.W.2d 801 (Tex. Crim. App. 1974), and *People v. Brethauer*, 174 Colo. 29, 482 P.2d 369 (1971), also involved incorrect applications of the test. The cases do not reveal a problem with the *Aguilar-Spinelli* test, but rather with the court applying the test.

90. The affidavit in *Palanza* was quite similar to the one in *Jones*, which was cited in *Aguilar* as an example of how the prongs could be satisfied. See *supra* notes 14, 56.

be applied in an overly technical manner, not that the test itself is defective.<sup>91</sup> The Court could have remedied the problems illustrated by *Palanza* without resort to the totality of the circumstances standard.<sup>92</sup>

Justice White also argued that a clarification of *Aguilar-Spinelli* would have been preferable to abandoning the test.<sup>93</sup> His argument is persuasive, because much of the confusion that had arisen surrounding the *Aguilar-Spinelli* test was traceable to the confusing majority opinion in *Spinelli*.<sup>94</sup> The area of greatest uncertainty under *Spinelli* was the effect of police corroboration on a tip insufficient on its face.<sup>95</sup> Justice White's concurring opinion in *Gates* provided the necessary clarification by detailing the effect of corroborative evidence on each prong of the *Aguilar-Spinelli* test.<sup>96</sup> Adoption of his suggestions would have eliminated many of the problems that magistrates and lower courts were encountering in applying the *Aguilar-Spinelli* test,<sup>97</sup> and also would have avoided the potentially undesirable consequences of the new totality of the circumstances standard.<sup>98</sup>

The new test announced in *Gates* undoubtedly will lead to a looser probable cause standard. Magistrates and lower courts likely will continue to evaluate informer tips by examining the veracity and basis of knowledge of the informer, both because they are accustomed to applying such an analysis and because *Gates* expressly reaffirms the relevance of these factors in the probable

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91. See *United States v. Ventresca*, 380 U.S. 102 (1965). In *Ventresca* the Supreme Court reversed an appellate court's holding that a lengthy affidavit describing defendant's alleged operation of an illegal distillery was deficient under *Aguilar* because it did not clearly reveal how all of the information in the affidavit (most of which came from government investigators) had been obtained. The Court felt that the lower court's reading of the affidavit was too technical, and upheld the search. Despite cautioning against "technical requirements of elaborate specificity," *id.* at 108, the *Ventresca* court reaffirmed the requirement that both *Aguilar* prongs be satisfied. Justice Goldberg, author of the *Aguilar* opinion, also wrote for the Court in *Ventresca*, and it is unlikely that he intended his *Ventresca* opinion, which followed *Aguilar* by only one year, to conflict with the prior holding. *Ventresca* stood for the proposition that magistrates must take a commonsense approach in deciding whether *Aguilar*'s prongs have been satisfied, not that they may disregard the prongs entirely. *Id.* at 108-09.

92. *Gates*, 103 S. Ct. at 2350 n.26 (White, J., concurring).

93. *Id.* at 2350-51 (White, J., concurring).

94. While *Spinelli* was fairly clear in stating the general principle that a tip, when considered along with other supporting evidence, must be as reliable as one that would pass *Aguilar*'s test standing alone, see *supra* text accompanying note 10, the opinion was quite confusing in its attempt to outline exactly how this principle should be applied. Justice Brennan stated in *Gates* that the Court's opinion in *Spinelli* was "not a model of clarity." Brennan, like many others, looked to Justice White's concurring opinion in *Spinelli* for a proper explanation of the holding. See, e.g., LaFave, *supra* note 7, at 7 n.28; Moylan, *supra* note 7, at 773; Comment, *supra* note 7, at 104. The uncertainties inherent in *Spinelli* led many lower courts to confuse the two prongs of the test and the ways in which each could be satisfied. See Moylan, *supra* note 7, at 779-81.

95. For a discussion of the rules of corroborating evidence, see LaFave, *supra* note 7, at 49-67. Most of the confusion centered on when corroboration could be used to satisfy either prong, and what type of corroborative evidence would suffice. See *supra* note 46.

96. See *supra* note 46.

97. Justice White acknowledged the possibility that lower courts would be unable to apply the *Aguilar-Spinelli* analysis properly even after a clarification by the Court. He felt, however, that any abandonment of *Aguilar* and *Spinelli* should have been postponed until the cases had first been clarified. *Gates*, 103 S. Ct. at 2350-51 (White, J., concurring).

98. See *supra* text accompanying notes 59-64.

cause determination.<sup>99</sup> Any tip that would have satisfied *Aguilar-Spinelli* thus will also satisfy the new test. More tips, however, will be found sufficient under *Gates* than under *Aguilar-Spinelli* because the magistrate will be free to overlook a deficient showing on one of the prongs in his consideration of the totality of the circumstances presented to him. By loosening the probable cause standard, the Court indirectly decreased the importance of the exclusionary rule,<sup>100</sup> a modification that it had been unwilling to make directly.<sup>101</sup> If fewer searches are found unconstitutional because the test applied to supporting affidavits is less stringent, the remedy of exclusion will be triggered less often.

The primary flaw in the Supreme Court's decision in *Gates* is that the Court need not have taken the action it did to achieve the result it desired. The Court properly was concerned with eliminating some of the confusion that had arisen surrounding the *Aguilar-Spinelli* test in order to simplify the warrant process and preclude unduly strict applications of the test. The new totality of the circumstances standard certainly achieves these goals, but by abandoning the strict two-pronged requirements of *Aguilar-Spinelli* it also loosens the probable cause standard. A clarification of *Aguilar* and *Spinelli*, as urged by Justice White, would have remedied the same problems that *Gates* sought to remedy, and also would have avoided the possible undesirable consequences of the new test. Justice White feared that the *Gates* holding might lead to "an evisceration of the probable cause standard."<sup>102</sup> Whether this drastic result will follow remains to be seen. What is certain after *Gates*, however, is the increased probability that intrusions into the privacy of private citizens will be authorized on less-than-reliable information.

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99. *Gates*, 103 S. Ct. at 2327.

100. While not all probable cause cases involve information from informers, one commentator has noted that *Aguilar-Spinelli* cases constitute "the bulk of probable cause law." See 8B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 41.04, at 43 (2d ed. 1983). The looser probable cause standard adopted in *Gates* thus will reduce significantly the number of cases invoking the exclusionary rule.

101. See *supra* note 25.

102. *Gates*, 103 S. Ct. at 2350 (White, J., concurring).